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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ADOLPHO ROSALES,

Defendant and Appellant.

G054587

(Super. Ct. No. 15HF1119)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Cassidy, Judge. Affirmed.

Eric. E. Reynolds, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Tami Falkenstein Hennik and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Adolpho Rosales was convicted on charges of residential burglary (Pen. Code, §§ 459, 460, subd. (a)),¹ vandalism (§ 594, subd. (a)/(b)(2)(A)) and possession of drug paraphernalia (Health & Saf. Code, § 11364 (subd. (a))), after he was discovered by a homeowner inside her home in the middle of the night, and then fled. Shortly thereafter, he was apprehended by police while hiding in a nearby bush, where he had attempted to bury a knife in his possession.

Rosales argues his conviction must be reversed because the trial court erroneously instructed the jury that it could not consider his voluntary intoxication in determining whether his acts of fleeing the scene or hiding evidence demonstrated “he was aware of his guilt.” We disagree. The jury was instructed it could consider his voluntary intoxication only in deciding whether he entered the residence with the intent to commit a theft. Because the jury’s permissive consideration of his flight, and his effort to hide the knife, are relevant only on the issue of whether Rosales was aware of his guilt, the jury’s consideration of those factors falls within its assessment of his intent in entering the residence.

Rosales also challenges two conditions of his probation: that he seek employment “as approved by probation,” and that he maintain residence “as approved by probation.” He argues both provisions are unconstitutionally overbroad and represent an

¹ All further statutory references are to the Penal Code unless otherwise indicated.

improper delegation of judicial authority. As we will discuss, we find these issues have become moot.

FACTS

During the night of September 30, 2015, Leeanne and Willy B.² were asleep in their home when Leeanne was awakened by a loud noise. Thinking the noise might be caused by their cat, Leeanne got up to investigate. She ran into an intruder, later identified as Rosales, as soon as she walked out of her bedroom. Leeanne screamed, and Rosales said, “Oh, no,” and ran out the kitchen doors leading to the backyard.

Leeanne’s scream woke her husband, Willy, who briefly gave chase while Leeanne called 911. Rosales jumped over the backyard fence, and Willy did not follow him.

Sheriff’s deputies responded quickly, and within minutes, they located a heat signature in the bushes roughly two houses away. Deputies discovered Rosales hiding in the bushes. With guns drawn, the deputies ordered him to crawl out.

As he did so, one of the deputies observed Rosales trying to hide a knife by pushing it into the dirt near a small tree. Once he was out of the bushes, the deputies noted Rosales had slow speech and seemed lethargic, but he appeared to have no difficulty understanding their orders and responding appropriately.

Rosales had a black beanie and black gloves in his possession, as well as a small amount of marijuana, a prescription bottle marked as containing Paroxetine, but which contained Clonazepam pills instead, and a used syringe with a brown residue.

Back in the residence, Leeanne found a backup hard drive and a blank computer disk on the kitchen floor, although both items were usually kept on a shelf in the home office. She also discovered that the home office shelf was in disarray, as

² For clarity, we refer to the victims by their first names, and intend no disrespect.

though someone had rummaged through it. Leeanne additionally found a replica antique pistol, normally kept in a bookcase, on the floor in the home office, and she found that several doors to a china cabinet had been opened.

Outside, Leeanne discovered the screen had been slashed and torn off the kitchen window, and that the screen for a sliding door in the dining room had been opened, although the sliding door itself remained locked.

Rosales testified at trial on his own behalf. He explained that he had been diagnosed with depression, mild schizophrenia, insomnia, general anxiety disorder and social anxiety disorder, and that he takes Paxil, Clonazepam, Xanax and Subutex to address those conditions.

Rosales stated that on the day of the break-in, he spent time hanging out with friends in Dana Point. He claimed that during that time, he smoked marijuana, drank six beers and four shots of vodka, and ingested Clonazepam, both orally and intravenously, as well as methamphetamine.

Around 9:30 p.m., Rosales rode the bus to Aliso Viejo with his girlfriend. He recalled walking her home, then smoking more marijuana and taking another Clonazepam pill. He started feeling the effects of the Clonazepam “pretty intensely” after that, and began to feel like he was “blacking out.” He testified that the next thing he remembered was being “woken up in the bushes.”

Rosales explained he usually wore a beanie all year round to cover his messy hair because he was “sort of lazy about combing it or styling it.” He speculated that although he had no particular memory of wearing the gloves, he may have had them “due to the fact that I was sort of on the streets, maybe to keep warm.” He denied any recollection of having a pocket knife.

Rosales also relied on the testimony of Dr. Paul Corona, a family practice physician, who stated that the side effects of Clonazepam, a sedative, can include cloudy thinking, impaired judgment and hallucinations. Dr. Corona explained that Clonazepam

will largely counter-balance methamphetamine, a stimulant, although methamphetamine can also exacerbate the effects of Clonazepam. He stated that he advises his patients not to take Clonazepam with alcohol because the combination can cause cognitive impairment or fatigue. Similarly, Dr. Corona stated marijuana could cause increased cognitive impairment when combined with Clonazepam.

In closing argument, Rosales's counsel did not dispute his client was the intruder Leeanne had encountered in her residence. Instead, counsel told the jury that "the only issue that you need to decide today in this case [is] whether he entered the home to commit a theft."³ She repeatedly emphasized that "whether Mr. Rosales had theft on the brain that evening" was the "ultimate fact [the jury was] here to decide."

The court instructed the jury with a modified version of CALCRIM No. 3426, which explained: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with the specific intent to commit theft when he entered the residence. [¶] . . . [¶] You may not consider evidence of voluntary intoxication for any other purpose."

The court also instructed the jury, in accordance with CALCRIM Nos. 371 and 372, that "[i]f the defendant tried to hide evidence" or "[i]f the defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime," such conduct "may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of

³ In arguing Rosales had no such intent, his counsel pointed to evidence that Rosales paid no attention to more valuable items in the home, including electronics, valuable artwork, etc., and he made no attempt to rummage through drawers looking for jewelry or money. Instead, he seemed interested in only a computer CD and hard drive with no marketable value. She characterized this as simply "odd behavior" which did not readily suggest an intention to commit theft.

that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself.”

The jury convicted Rosales on the counts of residential burglary, vandalism and possession of drug paraphernalia.⁴ The court suspended imposition of the sentence and placed Rosales on three years’ probation with the condition that he serve 365 days in county jail and pay various fines and fees. Rosales was credited with 125 actual days of presentence custody and 125 days of conduct credit, for a total of 250 days of presentence custody.

DISCUSSION

1. *Instructional Error*

CALCRIM Nos. 371 and 372 informed the jury that it may, but was not required to, infer from Rosales’s flight and attempt to hide his knife, “that he was aware of his guilt.” Rosales contends the trial court committed instructional error because it failed to modify the standard instruction on voluntary intoxication—which tells the jury it may consider his intoxication only in deciding whether he entered the residence with the specific intent to commit a theft, and for no other reason—to expressly permit the jury to also consider his intoxication in evaluating whether his flight and attempt to hide the knife demonstrated he was aware of his guilt.

We disagree. “Jury instructions must be read together and understood in context as presented to the jury. Whether a jury has been correctly instructed depends upon the entire charge of the court.” (*People v. Tatman* (1993) 20 Cal.App.4th 1, 10.) Moreover, because “[j]urors are presumed to be intelligent persons capable of

⁴ Rosales was also charged with additional counts alleging he possessed a controlled substance without a prescription (Bus. & Prof. Code, § 4060) and that he possessed marijuana (Health & Saf. Code, § 11357, subd. (b)). Those counts were dismissed.

understanding and correlating jury instructions” (*People v. Brock* (2006) 143 Cal.App.4th 1266, 1277), “[a]n erroneous instruction requires reversal only when it appears that the error was likely to have misled the jury.” (*Ibid.*)

Taken together, these instructions did allow the jury to consider Rosales’s intoxication in connection with determining his awareness of guilt. As Rosales’s counsel repeatedly emphasized at trial, the sole issue before the jury, which the prosecutor had the burden of proving, was whether Rosales intended to commit a theft when he entered the residence. The jury was specifically instructed it could consider his claim of voluntary intoxication in deciding that issue.

The jurors were also instructed that they were permitted to consider his flight, and his attempt to hide his knife, as evidence bearing on that same issue—i.e., as evidence he was aware he had entered the house with the intent to commit a theft. Since the jury understood that the possibility Rosales was aware of his guilt was simply a permissible factor to consider in determining whether he specifically intended to commit the charged crime, the jury’s assessment of that factor fell within the scope of allowable consideration of his intoxication. We consequently find no error.

2. *Overbroad Probation Conditions*

On our own motion we take judicial notice of a Superior Court register of actions in this case dated October 17, 2018, which indicates that Rosales’s probation was terminated on that date when he was found in violation and sentenced to state prison.⁵ Before doing so, we gave notice to the parties and provided them with an opportunity to object. We also invited them to inspect the register of actions and file supplemental letter briefs addressing whether that termination renders Rosales’s appeal of the probation terms moot. We have considered the parties’ letter briefs as we decide this appeal.

⁵ Evidence Code sections 452, subdivision (d), and 459, subdivision (a); *People v. White* (2014) 223 Cal.App.4th 512, 519-520, fn. 4.

“It is a fundamental principle of appellate practice that an appeal will not be entertained unless it presents a justiciable issue.” (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1489.) ““[A]s a general rule it is not within the function of the court to act upon or decide a moot question or speculative, theoretical or abstract question or proposition, or a purely academic question, or to give an advisory opinion on such a question or proposition.”” (*Id.* at p. 1490.) As a general rule, the termination of a defendant’s probation renders an appeal challenging probation conditions moot. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120, fn. 5.)

Since Rosales is no longer on probation, he cannot benefit from the portion of his appeal challenging any term of that probation. That portion of his appeal therefore has become moot.⁶

DISPOSITION

The judgment is affirmed.

GOETHALS, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.

⁶ Rosales in his letter brief asks us to decide this issue notwithstanding its mootness. We decline to do so as we find the issues raised are not “capable of repetition yet likely to evade review.” (*Williams v. Superior Court* (2014) 230 Cal.App.4th 636, 654, disapproved on other grounds in *People v. DeLeon* (2017) 3 Cal.5th 640, 653.)